STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2006
v	No. 259823 Washtenaw Circuit Court
ALBERT DAMANE CARRIS MITCHELL, Defendant-Appellant.	LC No. 04-000254-FH

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of fourth-degree fleeing and eluding a police officer, MCL 257.602a(2), and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced to two years' probation. We affirm.

Defendant first argues that the circuit court erred in denying his *Batson*[1] challenge. We disagree. The applicable standard of review for a *Batson* challenge depends on which of *Batson*'s three steps is in dispute. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005). "[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review." *Id.* at 342. The second step is reviewed de novo. *Id.* at 343. The third step is a question of fact reviewed for clear error. *Id.* at 344-345.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of preemptory challenges to excuse "a prospective juror solely on the basis of the person's race." *Id.* at 335. In examining the constitutionality of a preemptory challenge, the following three-factor *Batson* analysis governs:

> First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. . . .
>
> Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Batson*'s second step "does not demand

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

> an explanation that is persuasive, or even plausible." Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." [*Id.* at 336-337 (citations omitted).]

"The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing." *People v Bell*, 473 Mich 275, 283, 300; 702 NW2d 128 (2005) (Corrigan, J.), (Weaver, J.).

> Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot. [*Knight, supra* at 337-338 (citations omitted).]

"[T]he establishment of purposeful discrimination 'comes down to whether the trial court finds the . . . race-neutral explanations to be credible. . . . Credibility can be measured by, among other factors, . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rational has some basis in accepted trial strategy.'" *Bell, supra* at 283 (Corrigan, J.) (citations omitted).

During voir dire, the prosecutor asked the prospective jurors whether they had had any experiences with police officers, positive or negative. One juror, an African-American, indicated that he had been pulled over and had his car searched, all without reason or justification. The prosecutor thereafter exercised a preemptory challenge to excuse the juror.

The first *Batson* step is moot because all three steps were examined and resolved below. *Knight, supra* at 338. Regarding the second step, the prosecutor proffered the following justification for its challenge:

> I have a race neutral reason. It was his [the juror's] comment with regards to his contact with . . . [a] Police Department. He said that he was stopped for speeding and he was not speeding and was wearing his seat belt and so there was no reason for it and they searched his car. That is the kind of person, regardless of race, that I'm—not want on this jury. That is a race neutral reason.

This explanation is facially race-neutral and therefore valid. *Knight, supra* at 337. It is utterly unrelated to the prospective juror's race. Rather, it is tailored to the specific responses the juror offered. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991). Thus, the prosecutor's explanation satisfies the Equal Protection

Clause as a matter of law.

Defendant argues that, by virtue of the phenomenon "Driving While Black," African-Americans suffer from disparate treatment by police officers and are en masse likely to experience arbitrary police action, prejudicing them against police officers generally. This reality, defendant concludes, will effectively preclude African-Americans from jury service because prosecutors will peremptorily challenge individuals with such experiences, thereby violating equal protection. Defendant's argument is without merit. Such a conclusion would violate "the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Hernandez*, *supra*, at 359-360.

Regarding the third step, whether the prosecutor's explanation was a pretext for purposeful discrimination, the circuit court concluded that it was not. This determination is entitled to deference. *Knight*, *supra* at 344. No other prospective juror described a negative interaction with the police. There is accordingly nothing to suggest that the prosecutor was racially-motivated in exercising this challenge. It is a reasonable supposition that an individual who believes he or she was the subject of arbitrary police action would harbor ill-will toward police officers generally. See *United States v Steele*, 298 F3d 906, 913-914 (CA 9, 2002) (upholding a preemptory challenge based on a prospective juror's perceptions about police officers and the criminal justice system); *United States v Moreno*, 878 F2d 817, 820-821 (CA 5, 1989) (upholding a preemptory challenge based on a juror's "hostile attitude toward police officers"). Based on the foregoing, the court's determination was not clearly erroneous. *Knight*, *supra* at 344.

Defendant next argues that he was afforded ineffective assistance of counsel by defense counsel's failure to file a motion to suppress arising out of an allegedly illegal stop. We disagree. Defendant failed to seek a new trial or a *Ginther*[2] hearing before the circuit court. "When no *Ginther* hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993).

The accused is guaranteed the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. Counsel is presumed effective, and a defendant seeking to demonstrate the constitutional ineffectiveness of counsel bears a "heavy burden." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court set forth the following standard for claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

This standard was adopted by our Supreme Court in *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

A defendant claiming that counsel's performance was deficient must show that his counsel's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Strickland, supra* at 687-688; *Pickens, supra* at 312-313. Further, the defendant must overcome the presumption that counsel's decisions were "sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant has failed to establish either counsel's deficient performance or prejudice to himself. The crimes defendant was convicted of, fourth-degree fleeing and eluding and resisting or obstructing, involved events that occurred after and in response to the allegedly illegal stop. This Court has previously held that

> the exclusionary rule does not act to bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search. . . . Any other conclusion would effectively give a person who has been the victim of an illegal seizure the right to employ whatever means available, no matter how violent, to elude capture. [*People v Daniels*, 186 Mich App 77, 82; 463 NW2d 131 (1990).]

Evidence of defendant's actions subsequent to the allegedly illegal stop was therefore properly admissible and before the jury. In other words, no evidence sustaining defendant's convictions was admitted in violation of the exclusionary rule. *Id.* Any attempt by defense counsel to exclude the evidence at issue as to the relevant charges would have failed. Counsel is not required to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Therefore, defense counsel was not deficient in and defendant was not prejudiced

by counsel's failure to timely file a motion to suppress the evidence at issue as to the relevant charges. *Pickens, supra* at 309, 327.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto